



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

December 28, 1994

Ms. Elaine L. Fannin
Assistant General Counsel
Texas Department of Agriculture
P.O. Box 12847
Austin, Texas 78711

OR94-823

Dear Ms. Fannin:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, Government Code chapter 552. We assigned your request ID# 27688.

The Texas Department of Agriculture (the "department") has received a request for information relating to a department pesticide investigation. Specifically, the requestor seeks a copy of Incident Report No. 10-87-0329. You advise us that some of the requested information has been made available to the requestor. You seek, however, to withhold the remaining information, which you have submitted to us for review, and claim that section 552.101 of the Government Code in conjunction with common-law privacy excepts it from required public disclosure. We addressed the applicability of the claimed exception to some of the requested information in Open Records Letter No. 94-281 (1994). We limit our ruling here to the information not addressed in that ruling.

As we noted in Open Records Letter No. 94-281, you failed to request a decision within the ten day period section 552.301(a) of the Government Code mandates. When a governmental body fails to request a decision within ten days of receiving a request for information, the information at issue is presumed public. *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.--Austin 1990, no writ); *City of Houston v. Houston Chronicle Publishing Co.*, 673 S.W.2d 316, 323 (Tex. App.--Houston [1st Dist.] 1984, no writ); Open Records Decision No. 319 (1982) at 1-2. The governmental body must show a compelling reason to withhold the information to overcome this presumption. See *Hancock*, 797 S.W.2d at 381; Open Records Decision No. 319 at 1-2. Normally, a governmental body can overcome the presumption of openness by a compelling demonstration that the governmental body should not release the requested information to

the public, *i.e.*, that some other source of law makes the information confidential or that third party interests are at stake. Open Records Decision No. 150 (1977) at 2. You claim that section 552.101 of the Government Code excepts the requested information from required public disclosure.

Section 552.101 excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." A governmental body must withhold information from required public disclosure under section 552.101 if the information meets the criteria the Texas Supreme Court articulated for common-law privacy in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Under *Industrial Foundation*, a governmental body must withhold information on common-law privacy grounds only if the information is highly intimate or embarrassing *and* it is of no legitimate concern to the public. While common-law privacy may protect an individual's medical history, *see, e.g.*, Open Records Decision Nos. 539 (1990); 455 (1987); 422 (1984), it does not protect all medically related information, *see* Open Records Decision No. 478 (1987). Individual determinations are required. Open Records Decision No. 370 (1983).

You have submitted to us for review numerous pesticide incident investigation reports and other related documents, including handwritten complaints, department questionnaires completed by complainants, and incident summaries and findings. These records contain some information that is intimate or embarrassing and of no legitimate concern to the public. We have marked the information that falls within the protection of common-law privacy. The department must withhold the marked information under section 552.101 of the Government Code, but must release the remaining information to the requestor.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and may not be relied upon as a previous determination under section 552.301 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,

A handwritten signature in cursive script that reads "Margaret A. Roll".

Margaret A. Roll
Assistant Attorney General
Open Government Section

MAR/GCK/rho

Ref.: ID# 27688

Enclosures: Marked documents

cc: Mr. Jon A. Overhultz
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(w/o enclosures)